No. 86-679

In the Supreme Court of the United States

OCTOBER TERM, 1986

BOOTH NEWSPAPERS, INC.,
Petitioner,

v

MIDLAND CIRCUIT JUDGE, DOW CHEMICAL COMPANY, CONSUMERS POWER COMPANY, BECHTEL POWER CORPORATION AND BECHTEL ASSOCIATES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

BRIEF IN OPPOSITION OF RESPONDENTS BECHTEL POWER CORPORATION AND BECHTEL ASSOCIATES PROFESSIONAL CORPORATION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Does Petitioner have a right of access to private non-adjudicative pretrial discovery materials produced by a non-party to complex civil litigation in reliance upon a protective order entered pursuant to the trial court's discretion to prevent the abuse that can attend discovery practice?

LIST OF PARENT, SUBSIDIARY AND AFFILIATED CORPORATIONS OF THESE RESPONDENTS

Bechtel Power Corporation is a wholly-owned subsidiary of Bechtel Group, Inc., a privately-held corporation. Bechtel Associates Professional Corporation is a privately-held corporation affiliated with Bechtel Power Corporation.

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Respondents, Bechtel Power Corporation and Bechtel Associates Professional Corporation (hereinafter "Bechtel" and "Respondents"), responding in opposition to Booth Newspapers, Inc.'s Petition for Writ of Certiorari, respectfully request that this Court decline review of the decision of the Michigan Court of Appeals, reported at 145 Mich. App. 396, 377 N.W.2d 868 (1985). The Michigan Supreme Court's declination of review is reported at 425 Mich. 854 (1986).

COUNTER-STATEMENT OF THE CASE

Petitioner, Booth Newspapers, Inc., seeks private, non-adjudicative materials produced under broad and liberal discovery rules for the purpose of publishing that information for commercial gain. While admitting that it has no greater rights of access to the judicial process than the public (Petition at A-3), Petitioner seeks direct access to those fruits of civil discovery not used in the adjudicative process as though it were a real party in interest in the underlying litigation.

Petitioner's objectives led it to seek intervention in a lawsuit involving the construction of a commercial power plant — the Midland Nuclear Power Plant ("Midland Project"). That lawsuit, *The Dow Chemical Company v. Consumers Power Company*, No. 83-002232-CK-D (Midland County Circuit Court filed July 18, 1983),[1] involves a contractual dispute between Consumers Power Company ("Consumers"), the owner of the project, and The Dow Chemical Company ("Dow"), one of the prospective commercial users of the plant. Bechtel was the designer/constructor of the Midland Project and is not a party to the underlying lawsuit (Petition at A-1). The Midland Project involves state-of-the-art technology and sophisticated design and construction techniques unique to nuclear power plants.[2] The millions of pages of materials generated in

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[1] Dow and Consumers have reached agreement in principle which, if culminated, will result in settlement and dismissal of the litigation. The trial has been indefinitely recessed to allow for finalization of that settlement.

[2] The nature of the Midland Project and Bechtel's involvement in that project were described in affidavits filed with the trial court in connection with Bechtel's demonstration of good cause for protective orders governing the use of materials it produced to the parties.

connection with this project by Bechtel contain proprietary commercial information which, if placed in the hands of Bechtel's competitors, would jeopardize its competitiveness in the nuclear power industry.[3]

Shortly after the suit between Dow and Consumers began, Bechtel was served with a subpoena by Dow for the production of its documents. When advised of Bechtel's estimate that the subpoena called for the production of approximately 100 million pages, Dow agreed to a narrower subpoena. Bechtel also informed the parties that it had substantial concerns regarding distribution of its materials and, in particular, a concern that without a protective order, its materials would come into the possession of Bechtel's competitors and others who would be able to use the information to Bechtel's substantial detriment.

When the parties and Bechtel were unable to agree on the provisions of an appropriate protective order, Bechtel filed a Motion For Entry of a Protective Order, along with an affidavit establishing good cause for an order protecting its materials from unnecessary distribution. That Motion, pursuant to notice, was argued in open court on January 13, 1984. Subsequent to that hearing and following instructions from the court as to issues in dispute, Bechtel and the parties reached agreement upon the terms of the Protective Order As to Documents Produced by Bechtel (Petition at Appendix E) which the court entered in April 1984. Pursuant to the trial

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[3] These materials contain, among other confidential data, information on construction, design and management techniques, financial data, methods of analyzing financial data, and other Bechtel techniques which give it a competitive edge in the highly competitive construction industry. Bechtel is understandably reluctant, for example, to allow the release of information which would severly undercut Bechtel's ability to successfully bid construction projects by allowing its competitors to take advantage of Bechtel's experience as a leader in the industry and its unique methods of estimating costs and other such items (*See supra* note 2.).

court's discovery procedures and in total reliance upon the protective order, Bechtel to date has produced over 800,000 pages of its documents to Consumers and Dow for review and has delivered copies of approximately 1.2 million pages to the parties.

The protective orders entered by the trial court expedited the discovery process and allowed the case to proceed to trial only sixteen months after the litigation was instituted. Absent the protective orders, this case would most likely still be in the discovery stage. If Bechtel had thought that its materials could subsequently be opened to public inspection, it would have pursued document-by-document confidentiality rulings prior to releasing its proprietary documents. The protective orders eliminated the necessity of such a cumbersome and expensive process by preserving the confidentiality of the materials subject to challenge by Dow and Consumers. The protective orders allowed efficient production of documents in the first and most time-critical phase of discovery, so that the depositions and interrogatories, many of which were keyed to documents previously produced, could follow.

Petitioner sought to intervene in the underlying suit several months after entry of the protective orders and after production of documents in reliance on the protective orders was underway. After the matter was fully briefed, the Midland County Circuit Court denied Petitioner's demand for intervention (made solely for the purpose of obtaining access to all pretrial discovery information) on the basis of Michigan procedural law (Petition at Appendix B).

Although Petitioner's request to intervene was denied, it and other members of the media were nonetheless allowed complete and contemporaneous access to the entire adjudicative process. Media representatives were in attendance at virtually every trial session and were actually handed copies of trial exhibits by representatives of the parties as those materials were introduced into evidence. When requests were made

to seal trial documents, the media, including Petitioner, through their respective counsel, were allowed to file opposing briefs and to present oral arguments. Petitioner was given a meaningful opportunity to challenge these requests. In fact, no trial documents were sealed nor were any trial sessions closed to the press or public.

On appeal, Petitioner claimed to have a First Amendment right of access to non-adjudicative discovery materials produced by Respondents and the parties. Respondents maintained throughout that this Court's ruling in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) established that the public and press have *no* First Amendment right of access to private non-adjudicative discovery materials. The Michigan Court of Appeals, agreeing that *Seattle Times* resolved the issue, denied Petitioner's complaint for superintending control, and did not find an abuse of discretion on the part of the trial court in entering the protective orders (Petition at A-3). This decision focused on Michigan's history of private discovery proceedings and the traditional right of the trial court to control its processes. The Michigan Court of Appeals also agreed that the trial court properly interpreted Michigan law in denying Petitioner's request to intervene solely to obtain private, non-adjudicative documents. The Michigan Supreme Court declined to disturb these findings.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

There is no issue presented in the instant case with respect to adjudicative documents. Petitioner enjoyed full and immediate access to all documents received into evidence or relied upon in the adjudicative process and had total access to all trial hearings. Therefore, the sole issue presented for consideration is Petitioner's allegation that denial of access to

private, proprietary, non-adjudicative discovery materials constituted a violation of Petitioner's First Amendment rights. Contrary to Petitioner's contention, this Court has already determined in *Seattle Times* that there is *no* First Amendment right of access to the non-adjudicative civil pretrial discovery materials sought by Petitioner in the underlying suit.

The decision of the Michigan Court of Appeals is in accord with *Seattle Times* and presents no conflict with decisions of the Circuit Court of Appeals. Accordingly, the Petition for Writ of Certiorari should be denied.

I.

THE DECISION OF THE MICHIGAN COURT OF APPEALS DOES NOT ABRIDGE ANY CONSTITUTIONAL RIGHTS AND IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT

In *Seattle Times* this Court recognized a substantial governmental interest in *not* extending the public's right of access to civil pretrial discovery materials. Indeed, this Court made it clear that there is *no* First Amendment right of access to non-adjudicative civil pretrial discovery materials:

> . . . [R]estraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

467 U.S. at 33.

This Court has continually emphasized the necessity of establishing two threshold requirements *before* a First Amendment right of access to various judicial processes will be recognized. First, the process must have traditionally been open to the public

at common law. Second, such "openness" must be a "positive factor in the proper functioning of the judicial system." *Press-Enterprises Co. v. Superior Court of California*, ___ U.S. ___, 106 S.Ct. 2735, 2741-42 (1986) ("*Press-Enterprises II*"). See also, *Richmond Newspapers v. Virginia*, 488 U.S. 555, 564-580 (1980) and *Seattle Times Co. v. Rhineheart*, 467 U.S. at 31-36.

Applying the first part of this analysis in the civil context, this Court observed in *Seattle Times*:

> Moreover, pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law. . . . and, in general, they are conducted in private as a matter of modern practice. . . .

467 U.S. at 33 (citations omitted). Clearly, there is no historical or common law foundation to support a First Amendment right of access to civil pretrial discovery. The Michigan Court of Appeals, cognizant of Michigan's long history of private civil pretrial discovery[4], reached the same conclusion.[5]

With respect to the second part of the access analysis, this Court in *Seattle Times* also made it clear that open civil pretrial discovery would *not* play a significant positive role in the functioning of that process. Indeed, this Court stated that there is a substantial need for allowing the exercise of discretion by trial

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[4] *See e.g. Schmedding v. May*, 85 Mich. 1, 48 N.W. 201 (1891) and *Park v. Detroit Free Press*, 72 Mich. 560, 40 N.W. 731 (1888).

[5] Petitioner's attempt to diminish the importance of historical access is unsupportable. This Court continues to rely on historical access as an important part of its analysis in access cases. In *Press-Enterprises II*, this Court relied heavily on California's history of allowing access to criminal pretrial hearings as justification for recognizing a public First Amendment right of access to such proceedings (106 S. Ct. at 2741-42). This continued emphasis of historical access as part of the analysis negates Petitioner's claim and supports the validity of the Michigan Court of Appeals' analysis.

courts to control discovery and, through the use of protective orders, safeguard the rights of producing parties under the broad and liberal parameters of modern discovery practice:

> Rule 26 [referencing Rule 26 of the Washington Civil Rules which the Court considered substantially identical to Fed. R. Civ. P. 26], however, must be viewed in its entirety. Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. Because of the liberality of pretrial discovery permitted by Rule 26(b) (1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties. The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery.

467 U.S. at 34–35.[6] Public access to the civil discovery process would only serve to enhance the potential for abuse already recognized by this and other courts.[7] As stated by this Court, the proper functioning of the judicial process requires that trial courts be granted wide latitude in the use of protective orders to prevent the harm which could result from the widespread dissemination of discovery materials:

> There is an opportunity, therefore, for litigants to obtain — incidentally or purposefully — information that not

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[6] The applicable Michigan General Court Rule 306.2 (reproduced in the Petition at p. 2-3), is substantially similar to the Washington discovery rule at issue in *Seattle Times* and to Fed. R. Civ. P. 26.

[7] *Seattle Times Co. v. Rhinehart*, 467 U.S. at 34, fn 20.

> only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes. . . . The prevention of the abuse that can attend the coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders. . . . The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.

467 U.S. at 35–36 (footnotes omitted).

Nowhere is this principle better illustrated than in the context of this case due to the millions of pages of material involved. The trial court was faced with the almost impossible task of facilitating economical and efficient discovery without the time and expense of individual privilege and confidentiality rulings on each and every document produced. Such rulings would have skyrocketed litigation expenses and imposed lengthy delays.[8]

Public access to the civil pretrial discovery stage, especially to documents produced by non-parties such as Bechtel, would not only increase the cost of litigation, but would impose even greater hardships on producing non-parties and result in a waste of precious judicial resources. There can be no serious question that public access to pretrial discovery would have a severely *negative* impact on the proper functioning of the judicial process.

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[8] Petitioner itself acknowledged that the purpose of the protective orders was to make "information freely and easily available to adversaries" (Booth Newspaper, Inc.'s Motion to Intervene and Vacate Protective Orders at p. 5).

Moreover, this Court in *Seattle Times* recognized a substantial governmental interest in preserving the integrity of the civil discovery process by allowing trial courts to exercise wide discretion in the use of protective orders:

> It is sufficient for purposes of our decision that the highest court in the State found no abuse of discretion in the trial court's decision to issue a protective order pursuant to a constitutional state law.

467 U.S. at 37. Further, this Court found not only that the potential for abuse which attends modern discovery practices *alone* justifies the use of protective orders, but also that the trial court is in the best position to decide which and when such protective orders are necessary. 467 U.S. at 35-36.

The trial court properly exercised its discretion in this case. The Michigan Court of Appeals did not find that the trial court abused its discretion in entering the protective orders. In accordance with the policy stated in *Seattle Times*, since there was no finding of an abuse of discretion by Michigan's highest reviewing court, the exercise of discretion by the trial court should not be reviewed further by this Court. This is especially true since there is no First Amendment right of access implicated.

II.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE MICHIGAN COURT OF APPEALS AND DECISIONS OF THE CIRCUIT COURTS OF APPEALS

Petitioner mistakenly attempts to demonstrate a conflict between decisions of the Sixth and Seventh Circuits and the decisions of the Michigan Court of Appeals and the D.C. Circuit in *In re the Reporters Committee for Freedom of the Press*, 773

F.2d 1325 (D.C. Cir. 1985), citing to *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983) and *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984).[9] The decisions of the Sixth and Seventh Circuits, however, relate only to rights of access to adjudicative materials which is *not* an issue here. The Michigan Court of Appeals affirmed a denial of access *only* as to non-adjudicative documents. Petitioner was, in fact, accorded the access rights recognized by the Sixth, Seventh and D.C. Circuits.

Petitioner is unable to cite to any decision which conflicts with *Seattle Times* or which supports its claim of conflict. Indeed, the circuits have followed this Court's lead in *Seattle Times* without conflict. (*See e.g., Cipollone* v. *Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986); *In re the Reporters Committee for Freedom of the Press*, *supra*; *Bank of America National Trust and Savings Assoc. v. Hotel Rittenhouse Associates*, 800 F.2d 339 (3d Cir. 1986); *Oklahoma Hospital Association v. Oklahoma Publishing Co.*, 748 F.2d 1421 (10th Cir. 1984).[10]

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[9] Petitioner also cites to the decision in *Plaquemines Parish v. Delta Development*, 472 So.2d 560 (La. 1985) to support its claim of conflict. The sole issue before the Louisiana Supreme Court was whether the trial court abused its discretion in entering a protective order and the propriety of the intermediate appellate court's action in expanding the order on appeal. The Louisiana Supreme Court's decision was further restricted by the unique factual circumstances presented in that case upon which its analysis was premised, 472 So.2d at 563.

[10] While some of these decisions deal with adjudicative documents, they nonetheless evidence the fact that *Seattle Times* is clearly understood and uniformly applied.

III.

THERE IS NO REVIEWABLE ISSUE WITH RESPECT TO THE DENIAL OF PETITIONER'S REQUEST TO INTERVENE IN THE PROCEEDINGS BELOW

Petitioner sought to intervene at the trial court level for the sole purpose of obtaining the non-adjudicative fruits of discovery. The trial court correctly determined that Petitioner had no right of access to those materials and that Petitioner's basis for seeking intervention was insufficient under Michigan law. Michigan law allowed intervention as of right only to those persons who could be bound by a judgment rendered in those proceedings.[11] As the trial court stated:

> Although those seeking intervention are engaged in the business of selling information to their subscribers, they have no greater right of access to information claimed to be public than any other individual in this society. . . . Under these circumstances, to grant these applicants intervention for the purpose of access alone would require that intervention be granted not only in this case, but in any other case to any curious citizen. (Petition at B-5).

The logic in this is clear. Unless an intervenor has an interest in the substance of the lawsuit sufficient to put it at risk in terms of a judgment rendered in that proceeding, there is no justifiable reason for granting the intervenor the rights accorded parties in the discovery process.

In any event, notwithstanding the technical nuances of Michigan intervention law, the fact is that Petitioner had a full and fair opportunity to object to the protective order and to challenge any and all requests to seal adjudicative materials.

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[11] Petitioner does not challenge the constitutionality or validity of the applicable intervention rule, Michigan General Court Rule 209 (reproduced in the Petition at Appendix K).

Nothing more is required. The denial of Petitioner's request to intervene is thus not properly an issue here.

CONCLUSION

Respondents, Bechtel Power Corporation and Bechtel Associates Professional Corporation, respectfully request that the Court deny Petitioner's Writ for Certiorari.

Respectfully submitted,

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Date: November 26, 1986